

<https://helda.helsinki.fi>

Law as Politics : Four Relations

Etxabe , Julen

2020

Etxabe , J 2020 , ' Law as Politics : Four Relations ' , Law, culture and the humanities , vol. 16 , no. 1 , pp. 24-41 . <https://doi.org/10.1177/1743872116679392>

<http://hdl.handle.net/10138/233864>

<https://doi.org/10.1177/1743872116679392>

cc_by_nc_sa

publishedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

Law as Politics: Four Relations

Law, Culture and the Humanities
1–18

© The Author(s) 2016

Reprints and permissions:
sagepub.co.uk/journalsPermissions.nav

DOI: 10.1177/1743872116679392

lch.sagepub.com



Julen Etxabe

Helsinki Collegium for Advanced Studies, University of Helsinki, Finland

Abstract

In a 2006 article, Duncan Kennedy identifies politics as the central dilemma of contemporary legal thought, but affirms that law is non-reducible to politics, which could be read as a partial retraction from the known coda “law is politics.” This article suggests an interpretation of his refusal to conflate law and politics not in terms of disavowal, or a way of distancing politics from law, but as an attempt to carve out a space from where to think of the *relational* aspect between law and politics. This becomes necessary due to a current phenomenon which Pierre Schlag calls “dedifferentiation,” where no distinction – and hence no relation – seems to be possible between law and other spheres of life. Opposing that conclusion, this article contends that engendering relations allows us to keep the terms connected in relative motion. The article then moves to describe four distinct modes of framing the relation between law and politics, which gives rise to very different disciplinary projects: *law as politics*, dating back to the legal realist movement; *law as political science*, which finds its current expression in empirical and quantitative research; *law as political philosophy*, generated by a renewed interest in “the political”; and *law as political contingent*, growing out of a similar interest but challenging the boundary-setting ambitions of philosophy. While the latter has not yet been adequately translated into law, I suggest as an alternative the work of Jacques Rancière, which declines to grant an aura of invincible ubiquity to any totalizing description, including neoliberalism’s attempt to present itself as a world system.

Keywords

law, politics, Duncan Kennedy, legal realism, New Legal Realism, Empirical Legal Studies, political philosophy, dissensus, Rancière, neoliberalism

In his 2006 article “Three Globalizations of Law and Legal Thought: 1850–2000,” Duncan Kennedy develops a structural mapping of three distinct waves of globalization.¹

1. Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850–2000,” in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006).

Corresponding author:

Julen Etxabe, Helsinki Collegium for Advanced Studies, University of Helsinki, P.O. Box 4, Fabianinkatu 24, FI-00014, Helsinki, Finland.

Email: julen.etxabe@helsinki.fi

Drawing on Saussure's *langue/parole* distinction, Kennedy aims to single out each period's legal consciousness, understood not as a particular ideology, jurisprudence, or set of rules, but rather as conceptual vocabulary, reasoning, and arguments – which are diversified as multiple local paroles.² Between 1850–1914, the first globalization (“classical legal thought”) emphasizes the theory of the “will” and private autonomy; between 1900–1968, the second globalization (“the social”) emphasizes law as purposive activity and regulatory mechanism; between 1945–2000, the third globalization (“contemporary legal thought”) lacks a discernible unifying concept and combines neoformalism from the first wave and policy analysis (or balancing) from the second.

Kennedy does not offer a causal explanation as to why these modes of thought emerged in the way they did, or what determined their content, but he identifies different provenances (Germany, France, and United States respectively), a prominent actor (an academic professor, a legislator, and a judge respectively), and a central dilemma for each: during the first, the question was the extent to which law should be moral; in the second, the question was the relation between law and society; in the third, the question is the relationship between law and politics, and thus the dilemma for the contemporary judge, who “simultaneously represents law against legislative politics domestically and sovereign politics internationally, and must defend the charge that he/she is a usurper, doing ‘politics by other means’.”³

While many aspects of Kennedy's article merit attention,⁴ it is not his periodization, methodology, narrative, conclusions, or blind spots⁵ that claim my interest here, but some critical reflections on the connection that he makes between law and politics at the end of his long article. In the final passages, Kennedy claims that the political ideologies pursued through contemporary legal consciousness are not internally coherent, which is surprisingly “an important antidote to the tendency to see a discussion of the politics of the law as reducing law to politics.”⁶ This reduction is impossible, so Kennedy claims, because the projects of the right and left oscillate between different poles (for example, libertarianism and social conservatism on the right; feminist politics of identity and queer theoretical anti-identity politics of sexual liberation on the left), which means that

2. Ibid., p. 22.

3. Ibid., p. 71.

4. Kennedy's article served to kick-start a series of workshops. The first took place at the University of Colorado-Boulder in 2011, and the articles were published in the *Comparative Law Review* 3 (2012). The second took place at Harvard Law School, and the results were published in *Law and Contemporary Problems* 78 (2015) and in *Law & Critique* 25 (2014).

5. A forceful criticism (which I cannot fully pursue in this article) is that Kennedy does not grapple with neoliberalism, understood not as a right-wing ideology but as itself a mode of thought, see Christopher Tomlins, “The Presence and Absence of Legal Mind,” *Law and Contemporary Problems* 78(1 & 2) (2015), 1–17. This failure to come to terms with neoliberalism has been read symptomatically as the element that could explain the demise (and lack of intellectual punch) of the CRITS in contemporary legal scholarship, see Corinne Blalock, “Neoliberalism and the Crisis of Legal Theory,” *Law and Contemporary Problems* 77(4) (2014), 71–103.

6. Kennedy, op. cit., at p. 72.

their content is no more “decidable” than was the question of legal validity for legal formalists. In fact, “[w]hen one traces the phenomenology of judging under uncertainty into the choice of an interpretation of one’s politics, it turns out that there’s an hermeneutic circle” whereby the “[c]ommitments of an actor within a legal consciousness shape politics as well as the reverse.”⁷ Kennedy concludes:

Even in Clausewitz’s famous formulation, war is politics *by other means*, not “just” politics. In Carl Schmitt’s flip of Clausewitz, politics is war by other means, but not reducible to war. ... If law is politics, it is so, again, by other means, and there is much to be said, nonreductively, about those means. By analogy with Schmitt, it seems to me also true that politics is law by other means, in the sense that politics flows as much as from the unmeetable demand for ethical rationality in the world as from the economic interests or pure power lust with which it is so often discursively associated.⁸

This tersely written final passage is not easily unpacked. Why does Kennedy insist that modern legal consciousness is not reducible to politics? Is the self-professed CRIT perhaps reversing course from the known coda “law is politics” and saying instead that law and politics are ontologically distinct? Precisely because he identifies politics as the driver of contemporary legal thinking, and yet refuses to reduce all law to politics, it makes sense to ask: What is the position that Kennedy is trying to articulate?

This is one of the questions posed by John Henry Schlegel’s critical reading.⁹ While professing admiration for Kennedy’s article, Schlegel confesses his difficulty in coming to terms with its conclusion. In particular Schlegel is “bothered” by Kennedy’s attempt to set law apart from politics, and finds it hard to understand “why he insists on differentiating law from those things (e.g. politics, economics, culture), with which it is ‘inextricably intertwined’.”¹⁰ After considering several hypotheses, Schlegel finds an assertion of the relative autonomy of each, namely, “the assertion that there is a core of economics, of law, of politics, that is not shared with the others.”¹¹ In doing so, Kennedy would be positing some “core” or “Aristotelian essence” and privileging law as the claimant of intellectual primacy.¹²

Although I do not presume to know what drives Kennedy (nor does this appear clearly stated anywhere in his text), I would suggest an interpretation of his refusal to conflate law and politics not in terms of disavowal, or a way of pushing politics away from law, but rather as an attempt to carve out a space from where to think about their mutual relation. In that reading, this space would be needed, though not to justify the relative autonomy of law or its priority; nor even to create a place for the critic to inhabit, as if above

7. Ibid.

8. Ibid., p. 72, internal footnotes omitted.

9. John Henry Schlegel, “Three Globalizations: An Essay in Inquiry,” *Law and Contemporary Problems* 78(1 & 2) (2015), 20-35.

10. Ibid., 20. While in practical terms he understands what Kennedy is driving at (i.e., “at some level of analysis, and for some purposes, law both is politics and is not”), in theoretical terms he is “bewildered” (at 28).

11. Ibid., 28.

12. Ibid. This is also observed by Tomlins, op. cit.

the fray of legal and political melees.¹³ Rather, this space would serve to express the *relational* aspect between law and politics, the relevance of which requires a detour that will hopefully serve to lay the groundwork for the second part of my article.

Indeed, Kennedy is struggling to articulate this position more clearly for a reason. This is due to a current phenomenon which Pierre Schlag calls “dedifferentiation.”¹⁴ For Schlag, the most sophisticated contemporary theories of law lead us to a point where we are no longer able to distinguish law from culture, or society, or the market, or politics, or anything of the sort. The problem begins “with the recognition that law determines, constitutes, constructs, shapes or otherwise ‘verbs’ the social, and the social in turn determines, constitutes, shapes or otherwise ‘verbs’ the law.”¹⁵ For example, Austin Sarat and Thomas Kearns argue that “[t]o recognize that law has meaning-making power, then, is to see that social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them.”¹⁶ In turn, Naomi Mezey suggests that “[p]erhaps we should not speak of ‘relationship’ . . . at all, as this tends to reinforce the distinction between concepts that my description here seeks to deny.”¹⁷ For Schlag this entails that “[i]dentities previously thought separate and distinct . . . turn out to be inextricably intertwined. Each is already inextricably the other – in ways that cannot be disentangled through any definition, specification, stipulation or theorization.”¹⁸ According to Schlag, the dedifferentiation problem is not some claim that the relations between law and the social (or law and politics, law and economics, law and language, and so on) are complicated or difficult to articulate, but that “*there is nothing to be said* about the relations between the two identities because we were never entitled to separate them out in the first place.”¹⁹ This stark conclusion has not sufficiently dawned on legal theory, which has traditionally got off the ground by distinguishing law from something else (morality, society, politics, aesthetics, and so forth).²⁰

How fatal is this for an argument, like the one in this article, which seeks to think through the relationship between law and politics? A few pages after the passage cited, Mezey states conclusively: “While I agree that law and culture do not exist

13. Catharine Wells reads Kennedy as articulating a meta-theoretical position, see “Thoughts on Duncan Kennedy’s Third Globalization,” *Comparative Law Review* 3(1) (2012), 1–10. But Kennedy places his own critical, interpretive approach in opposition to *reconstructive* methodologies that aim to achieve a distanced understanding of the relation of law to other domains (op. cit., p. 71).
14. Pierre Schlag, “The Dedifferentiation Problem,” *Continental Philosophy Review* 42 (2009), 35–62.
15. *Ibid.*, at 39.
16. Austin Sarat and Thomas Kearns, “The Cultural Lives of Law,” in Sarat and Kearns (eds), *Law in the Domains of Culture* (Ann Arbor, MI: University of Michigan Press, 1998), p. 10.
17. Naomi Mezey, “Law as Culture,” *Yale Journal of Law & the Humanities* 13 (2001), 35–67, 46.
18. Schlag, op. cit., 37.
19. *Ibid.*, 37, emphasis added. At the same time, Schlag says it is important not to overstate the point, for “the differentiation between law and the social remain to some degree ideationally perspicuous as well as socially real and effective” (at 52).
20. *Ibid.*, 56.

independently of each other, I disagree that their necessary interconnections make them indistinguishable from one another.”²¹ Moreover, she also affirms that “if one were to talk about the relationship between law and culture, it would certainly be right to say that it is always dynamic, interactive, and dialectical.”²² Therefore, Schlag overstates his point when concluding that there is nothing to be said about their relations. Mezey seems to be warning not against distinctions, but against reifying tendencies *when* doing so, treating each term of the relationship “as if they were two discrete realms of action and discourse,”²³ or Aristotelian essences in Schlegel’s language. Simply put, the problem is not the relation, but what to make of it.

One way to untangle the paradox of Mezey’s “non-relational relation” is to mark a shift from the simple connector “and” to the different “as,”²⁴ which already introduces a logic of differentiation. To define something as something else (i.e., as something other than traditionally defined – be it as culture, politics, rhetoric, society, justice...) is to suggest this relation is not conventionally given, but imaginatively engendered. In fact, to think of law *as* something else does the opposite of demarcating separate and autonomous spheres, for it maintains both in *relative motion*. This is in fact a critique that can be levelled against the separation thesis of legal positivism, the colonization of law by economics, or the fetishization of certain strands of law and literature, where literature is thought to possess the attributes that would come to redeem law.²⁵ This is also true of the claim “law is politics,” which aimed to poke holes in the thick armor of legalism. As a reminder that an ineradicable political element exists in every legal judgment, “law is politics” makes good sense insofar as someone opposes it. If, on the other hand, one takes the sentence as a free-standing ontological claim, then it hides more than it reveals, as it misses or distorts aspects of both law and politics. Accordingly, the copulative “is” does not actually express a relation of identity between both terms, but of productive tension – both among the terms themselves and with their implied audience.

To establish a relation, then, does not entail fixing core identities, because the meaning of each term fluctuates depending on how the connection is established. To think of the relation between law and politics is to reflect not only on the nature of the connector (copulative, disjunctive, supplementary, metonymical, and so forth), but about the *entire assemblage* of co-implication enacted by that definition. This is precisely what Kennedy seems to be doing when keeping law and politics *connected* “by other means,” yet resisting the reduction of law to politics, which can be read as a slight self-critique of earlier views where law would mimetically replicate ideology.

Hence my second, and most significant point: to inquire how exactly the relationship between law and politics is configured enables us to identify at least four projects within what Kennedy calls contemporary legal thought and into the twenty-first century. First,

21. Mezey, op. cit., 47.

22. Ibid., 46.

23. Ibid., 36.

24. As Mezey writes, “What I am after is not to make sense of law *and* culture, but law *as* culture” (at 46).

25. Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (Abingdon: Routledge, 2012), esp. chapter 1.

law as politics, dating back to the legal realist movement and recently revived; second, *law as political science*, which finds its current expression in empirical and quantitative research. Third, *law as political philosophy*, generated by a renewed interest in “the political” in continental philosophy. Fourth, *law as the political contingent*, growing out of a similar interest, but challenging the boundary-setting ambitions of philosophy. While the latter project has not yet been adequately translated into law, I would suggest the work of Jacques Rancière as an avenue for future work.²⁶

My purpose is not to “map” contemporary legal scholarship, but to delineate four major lines of intersection, examine their underlying assumptions, and ultimately defend my own scholarly preference for the last of these as the most promising rejoinder to our contemporary predicament. These categories of analysis are not “deep structures” as in Kennedy’s three globalizations. Rather, they are sites or intersecting nodes for possible linkages between law and politics. They are not so much *approaches* to law and politics, but rather *modes of constituting* their interaction, which do not preexist like a glove for the hand, but are formed whenever we act on their presuppositions. In my preferred understanding, law and politics are not discrete “fields” to be united or separated, but *distinct ways of making sense of the real* as Clifford Geertz might put it.²⁷ The connector “as” signals the oscillation or interval between modes of combining the two terms (and their permutations).

I. Law as Politics

Exemplary of this modality is the American legal realist movement. This is not the place to rehearse a well-known story, but legal realism can best be understood as an attack against formalist “legal science” as practiced by legal dogmatics and perfected by the pandectist school in Germany. Rationalist-idealist science, which differs greatly from the more empiricist science advocated by realists, prioritized abstraction of first principles, deductive reasoning, logical consistency, and systematization.²⁸ In what to my mind is still the sharpest expression of this critique, Felix Cohen referred to legal science oozing scholasticism as “transcendental nonsense.” That is, a science in “the heaven of legal concepts”²⁹ preoccupied with metaphysical “essences,” akin to theologians arguing about “how many angels can stand on the point of a needle.”³⁰ Cohen noted critically that

-
26. See Mónica López Lerma and Julen Etxabe (eds), *Rancière and Law* (Abingdon: Routledge, forthcoming).
 27. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), pp. 173–184.
 28. Roscoe Pound, “Mechanical Jurisprudence,” *Columbia Law Review* 8 (1908), 605–23. To make the law more “scientific” was then to bring it closer to the rest of the social sciences, rather than as an autonomous, self-sufficient discipline (see also Pound, “The Scope and Purpose of Sociological Jurisprudence,” *Harvard Law Review* 25 (1912), 140–68).
 29. The reference is to Rudolf von Jhering’s satirical text “In the Heaven of Legal Concepts: A Fantasy,” trans. Charlotte Levy, *Temple Law Quarterly* 58 (1985), 799–842 [originally published in 1884].
 30. Felix Cohen, “Transcendental Nonsense and the Functional Approach,” *Columbia Law Review* 35 (1935), 809–49, 810.

“to justify or criticize legal rules in purely legal terms is always to argue in a vicious circle,”³¹ just as “Molière’s physician’s discovery that opium puts men to sleep because it contains a dormitive principle.”³² Realists decried the self-sufficiency and separation of legal science from the rest of the social sciences – including a political interpretation of jurisprudence.³³

Within this realist frame, politics appears not only in the realists’ attempt to “de-purify” legal science, but also in their understanding of law. For the realists, law is neither a formal and systematic abstraction, nor something that grows and evolves naturally as does a society’s *Volksgeist*, but rather the result of multiple social forces (closer to the thesis of social struggle defended by Jhering against Savigny³⁴) and memorialized in Holmes’ “the life of the law has not been logic: it has been experience.”³⁵ At the same time, the growth of law was also the result of purposeful activity.³⁶ Realists understood law “as a means to an end” (in reference to another of Rudolf von Jhering’s works), which opened it up to all forms of instrumental rationality (Max Weber), in efforts either of social engineering or progressive reform.³⁷

Thirdly, the politics of realism appears most visibly in the analysis of legal relations (e.g. employer/employee; landlord/tenant; factory owner/worker). Realists shared an anti-*Lochnerian* outlook and criticized *laissez faire* liberalism as protecting entrenched interests, rather than as a neutral protector of individual rights. Instead, realists analyzed property and contractual relations not as derived from private autonomy, but as relations of power, where the state both created and enforced this regime through coercion.³⁸ Lastly, politics also appears in the theory of adjudication: neither legal rules nor syllogistic reasoning could determine the outcome of cases, which inevitably entailed choice.³⁹ Realists were not the first to observe that rules alone do not constrain the judge (some positivists like Austin and Kelsen did, too), but they pragmatically embraced considerations of policy (Pound), purpose (Cardozo), consequences (Dewey), and function (F. Cohen).

It has become a commonplace to say that “we are all legal realists now,” but this seems more an attempt to domesticate realism’s critical edge. Rather, realism suffered a bifurcation: first, a social scientific orientation towards policy analysis, impact studies,

31. Ibid., 814, footnote omitted.

32. Ibid., 820.

33. See Pound, “Sociological Jurisprudence.”

34. Jhering, *The Struggle for Law* (1872).

35. Oliver Wendell Holmes, *The Common Law* (Boston, MA: Little, Brown, 1881), p. 1.

36. See Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), pp. 104-5 (arguing that Savigny’s conception of law as developing silently and unconsciously is a partial and incomplete truth, because law is also a conscious and purposed growth).

37. For the former, Pound, “A Survey of Social Interests,” *Harvard Law Review* 57 (1943), 1–39; for the latter, John Dewey, “Logical Method and Law,” *Cornell Law Quarterly* 10 (1924), 17–27.

38. Robert L. Hale, “Coercion and Distribution in a Supposedly Non-Coercive State,” *The Political Science Quarterly* 38 (1923), 470–94; also Morris Cohen, “Property and Sovereignty,” *Cornell Law Quarterly* 13 (1927), 8–30.

39. Karl Llewellyn, “Some Realism about Realism,” *Harvard Law Review* 44 (1931), 1222–64, 1252.

and efficiency in law and society and law and economics; second, a more critical orientation (critical also of the realists' positivist epistemology) such as critical legal studies (CLS), feminist legal scholars, critical race theory, post-colonial studies, and more.⁴⁰ The distinctive aspect is the view of law and politics as equally instrumental, which may have been the realists' most enduring legacy.⁴¹ As Brian Tamanaha writes, the instrumental view of law, the idea that law is a means to an end, is so taken for granted today that it rarely evokes comment; it is "almost a part of the air we breathe."⁴²

Most recently, a group of scholars with roots in the law and society movement have explicitly taken up the banner of New Legal Realism (NLR).⁴³ Like the old realism, the new realism includes a heterogeneous group united in their ambition to promote an empirically-grounded study of law, which evinces a relatively robust belief in the ability of empirical methods to give us reliable access to the objective world – however tentative and provisional that knowledge might be.⁴⁴ In addition to an empirical outlook, NLR scholars share a pragmatic attitude towards law as a problem-solving tool. As Gregory Shaffer advocates, "New Legal Realists ... study how actors use law instrumentally to intervene in social contexts to change those contexts."⁴⁵ It has been argued that a key point of difference between the old and the new realism is that the latter takes more explicitly into account critical epistemological challenges to factual and legal constructions.⁴⁶ Thus, some new realists incorporate the idea of *situated knowledge* – a critical reflection on the role of the social scientist in the production of research outcomes.⁴⁷ Nevertheless, the tendency remains strong to view law as an object of study that can be tested in order to assess its effectiveness, implementation, and/or impact.⁴⁸ Arguably,

40. Robert Gordon, "New Developments in Legal Theory," in David Kairys (ed.), *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982).

41. Austin Sarat and Jessica Silbey, "The Pull of the Policy Audience," *Law & Policy* 10 (1988), 97–166.

42. B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006), pp. 1, 101.

43. A programmatic statement for NLR can be found in H.S. Erlanger et al., "Is it Time for a New Legal Realism?" *Wisconsin Law Review* (2005), 335–63. See also V. Nourse and G. Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?," *Cornell Law Review* 95 (2009), 61–137.

44. Andrew Lang, "New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science," *Leiden Journal of International Law* 28 (2015), 231–54, 232; Stewart Macaulay, "The New Versus the Old Legal Realism: 'Things Ain't What They Used to Be'" *Wisconsin Law Review* (2005), 365–403.

45. G. Shaffer, "The New Legal Realist Approach to International Law," *Leiden Journal of International Law* 28 (2015), 189–210, 202, citation omitted.

46. Lang, op. cit., 240. See also A. McEvoy, "A New Legal Realism for Legal Studies," *Wisconsin Law Review* (2005), 433–54.

47. Sally Engle Merry, "New Legal Realism and the Ethnography of Transnational Law," *Law & Social Inquiry* 31(4) (2006), 975–95.

48. e.g. G. Shaffer and T. Ginsburg, "The Empirical Turn in International Legal Scholarship," *The American Journal of International Law* 106(1) (2012), 1–46 (reporting studies in international law).

NLR remains attached to a means-ends rationality, while recognizing that ends are not fixed but become transformed in the process of acting.

Concerning the law/politics relation, perhaps the closest to the “law-as-politics” modality are political scientists of the so-called attitudinal model, who ascribe the outcome of judicial decisions almost entirely to ideology, rather than legal reasoning, precedent, or statutory text.⁴⁹ This body of scholarship, dubbed “judicial politics,” joins with most radical realist and CLS scholarship in dismissing legal reasoning as *ex post facto* rationalizations. While dominant among political scientists, these studies have been criticized for failing to account for legal variables⁵⁰ and self-proclaimed new realists have parted ways with their presuppositions. Thus Shaffer explicitly argues that “scholars who reduce legal interpretation to a form of politics do not capture law’s particular institutional form of reasoning that contributes to law’s meaning.”⁵¹ Here is an ironic reversal, for the new realists come to the rescue of law as a distinctive form of institutional reasoning (hence distancing themselves from the old realists), whereas political scientists, who by their epistemological commitments seem closer to the “law-as-science” paradigm below, are in this respect much closer to the “law-as-politics” stance. In this way, scrutiny of the law and politics node reveals a major fault line in scholarly projects that the single umbrella-term New Legal Realism cannot keep united.

II. Law as Political Science

Rather than on the myriad studies conducted under socio-legal research, my focus is specifically on the latest and most successful newcomer, Empirical Legal Scholarship (ELS), which has been hailed as “arguably the next big thing in legal intellectual thought.”⁵² While sometimes conflated with NLR,⁵³ ELS usually refers to a specific variety of empirical research: “a model-based approach coupled with a quantitative method.”⁵⁴ Whether political scientists analyzing data on court opinions, behavioral economists relying on experimental psychology, or legal scholars assessing institutional

49. Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993).
50. Frank Cross, “Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance,” *Northwestern University Law Review* 92 (1997), 251–326.
51. Gregory Shaffer, “The New Legal Realist Approach”, 206. See also Brian Z. Tamanaha, “The Distorting Slant in Quantitative Studies of Judging,” *Boston College Law Review* 50(3) (2009), 685–758.
52. Tracey George, “An Empirical Study of Empirical Legal Scholarship: The Top Law Schools,” *Indiana Law Journal* 61(1) (2006), 141–61, 141.
53. Thomas Miles and Cass Sunstein, “The New Legal Realism,” *The University of Chicago Law Review* 75 (2008), 831–51. Cf. Elizabeth Chambliss, who surmises that NLR is poised to become a “countermovement” to ELS (“When Do Facts Persuade? Some Thoughts on the Market for ‘Empirical Legal Studies’,” *Law and Contemporary Problems* 71 (2008), 17–39, 23). For a comparison between NLR and ELS, see Mark Suchman and Elizabeth Mertz, “Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism,” *Annual Review of Law and Social Science* 6 (2010), 555–79.
54. George, *op. cit.*, 141.

design, “[t]he empirical legal scholar offers a positive theory of a law or legal institution and then tests that theory using quantitative techniques developed in the social sciences. The evidence may be produced by controlled experiment or collected systematically from real world observations. In either event, quantitative or statistical analysis is a central component of this project.”⁵⁵

One significant distinction from NLR is that whereas the latter advocates the study of law on the ground, ELS leans towards sophisticated technology, which has been made more accessible by a number of public-use databases and statistical software programs.⁵⁶ Moreover, in contrast to the old realists’ rule-skepticism and doctrinal indeterminacy, ELS often takes doctrine as a source of empirical propositions to be tested, raising concerns about its ability (and willingness) to escape the “pull of the policy audience.”⁵⁷ Operating under the shadow of “scientism,” ELS tends to conflate empirical with quantitative analyses, displaying a tendency to slight interpretive and qualitative approaches.⁵⁸ All this, paired with the self-perception of being the “next big thing,” can lead to losing sight of its shortcomings.

We have already mentioned the inability of the attitudinal model to account for legal variables.⁵⁹ But even the variables that are factored undergo the inevitable simplification of model-design: “ideology” becomes a proxy for a judge’s politics, which in turn is reduced to a liberal/conservative binary code. Yet surely politics cannot be reduced to ideology, nor can this binary sense of ideology convey the world-making, complex ways in which ideology shapes and interacts with individuals and society (Gramsci, Althusser). Thus, the suspicion arises that “the commitment of political scientists to a model of ideological decisionmaking may be explained in part by its convenience. Not only does the model conform to the conventional worldview of political science, but a simple and comprehensible theory makes modeling much easier.”⁶⁰ Omitted variables and simplifications aside, a wider criticism looms large: to be able to predict the outcome of legal disputes, as these studies claim to do, does not tell us all there is to know about the exercise and the value of judgment. As Gregory Sisk writes, “the translation of judicial

55. Ibid., 141.

56. Suchman and Mertz claim that “sophisticated methodology” has been made into a shibboleth (op. cit., 558).

57. Sarat and Silbey, op. cit. (referring to the need to generate “findings” that policy-makers can use).

58. Suchman and Mertz, op. cit., 558. For a critique of “scientism” aimed originally against the realist underpinnings of law and society, see David Trubek and John Esser, “‘Critical Empiricism’ in American Legal Studies: Paradox, Program, or Pandora’s Box?” *Law and Social Inquiry* 14 (1989), 3–52.

59. Segal and Spaeth say that the legal model “has not, and perhaps cannot, be subject to systematic empirical falsification because it cannot be effectively operationalized (cited in Cross, op. cit., 321). For recent attempts, see Stefanie Lindquist and David Klein, “The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases,” *Law and Society Review* 40(1) (2006), 135–61. Also Michael Gilbert, “Does Law Matter? Theory and Evidence from Single-Subject Adjudication,” *The Journal of Legal Studies* 40(2) (2011), 333–65.

60. Cross, op. cit., 298.

decisions into mathematical constructs can never fully convey the richness of the legal analysis contained in the written decision,” nor can it “capture the full dimension of that unique and important enterprise known as judging.”⁶¹

Similar concerns extend to behavioral studies on cognitive bias and heuristics, which have led to a surge of works suggesting religious bias, labor bias, immigration bias, confirmation bias, in-group bias, and so forth.⁶² These studies have surely enough demolished the myth of a rational actor postulated by legal formalism (and neoclassical economics), and yet something is not entirely satisfying in the constant finding of bias. In trying to disprove the myth of the rational actor, they seem to posit an ideal against which every judgment must, by definition, fall short. Accordingly, all data that deviate from the ideal serve as confirmation of “defective” forms of judgment. Read in this light, these studies resemble early law and society studies purporting to study the gap between law-on-the books and law-in-action, and can be subjected to the same kind of criticism.⁶³ Rather than taking *prejudices* as necessary givens of every judgment that might actually enrich it (as in the hermeneutic tradition), the constant finding of bias assumes that a gap exists and that this gap *must* be closed. Further, the studies assume that the gap *can* be closed (or severely contained), if only we were cognizant of these biases and made the appropriate institutional choices.

None of this should of course be read as a dismissal of empirical work, which can help us detect surprising and counter-intuitive findings. There is no denying that considerable ingenuity goes into the creation of experimental designs (which involves “as much art as science”⁶⁴) and painstaking efforts are needed for the collection and systematic parsing of data. Still, data are not self-explanatory and no method “is sure to provide answers to questions that you do not ask.”⁶⁵ Therefore, the temptation to turn every jurisprudential issue into a matter of empirics must be resisted as seriously misguided. Even when the claim is the apparently commonsensical admonition to combine quantitative with qualitative research, it is worth noting that the goals of different research may not be entirely compatible, or subject to the same “metric.”

Concerning ELS’s approach to law and politics, law is taken as an object to be measured, tested, and causally explained, rather than as something that individuals live by or inhabit. Correlatively, politics is viewed as a factor that either determines or heavily influences legal behavior, but which can be inoculated by use of the scientific method. Thus politics, while inescapable in legal judgment, is conspicuously absent from political *science*. Ironically, those who see nothing but ideology in legal actors fail to consider their own: the politics of knowledge is hidden under the mantle of a “sophisticated

-
61. Gregory Sisk, “The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making,” *Cornell Law Review* 93 (2008), 873–900, 887.
 62. e.g., Lee Epstein, Christopher Parker and Jeffrey Segal, “Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment” (available online at epstein.wustl.edu/research/InGroupBias.pdf).
 63. Richard Abel, “Law and Society: Project and Practice”. See also Miles and Sunstein, op. cit., *Annual Review of Law and Society* 6 (2010), 1–23.
 64. V. Nourse and G. Shaffer, op. cit., 4.
 65. Macauley, op. cit., 394, footnote omitted; Chambliss, op. cit., 36.

methodology” where the researcher appears to remain outside the analysis.⁶⁶ Drawing sharp distinctions between empirical and normative, causal vs interpretive, evaluative vs explanatory, this disciplinary project shares with legal realism a positivistic epistemology, which (unlike feminists and other critical discourses alluded to earlier), largely ignores the problem of the subject,⁶⁷ as well as the meaning-making, constitutive aspect of law.

III. Law as Political Philosophy

If the earlier two categories take law and politics down an empirical path, the next two lead us in a different direction. Within law as political philosophy we find, on the one hand, a *reconstructive* stream which seeks to establish the principles of “well-ordered” societies, based on principles of justice and overlapping consensus (Rawls), discourse theory (Habermas), and a principled judiciary (Dworkin). Reconstructive efforts find a most formidable challenge in the *agonistic* tradition (Mouffe, Tully, Honig), critical of former attempts to establish a society whence relations of power have been evacuated, and of the very ideal of consensus as prefiguring (and hence limiting) its ends.⁶⁸ A different stream vindicates a place for philosophical speculation and questions of first philosophy,⁶⁹ not led by immediate practical concerns, and which often require a space for silence.⁷⁰

Recent years have seen a veritable surge of “the political” in continental philosophy (Nancy, Lacoue-Labarthe, Lefort, Badiou, Agamben, Negri, Cacciari, Esposito, Laclau, Dussel). As popularized by Claude Lefort as part of a wider tradition in France,⁷¹ the political (*le politique*) differs from what we ordinarily mean by politics (*la politique*), namely, partisan ideology, parliamentary practice, or Realpolitik. In a world where the political has retreated into the givenness of everyday politics and the economy, Philippe Lacoue-Labarthe and Jean-Luc Nancy rescue a second sense of the word *retreat*, where “philosophy should withdraw from politics in order to allow it to ‘rethink’ the political.”⁷² We might say that philosophy comes *after* political life, but it tries to revert this chronology by setting politics “on the right track,” as either (or both) principle and beginning

66. For the hidden value-judgments entailed by ideology coding, see Carolyn Shapiro, “The Context of Ideology: Law, Politics, and Empirical Legal Scholarship,” *Missouri L. Review* 75 (2010), 79–142.

67. Austin Sarat and Jonathan Simon, “Beyond Legal Realism? Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship,” *Yale Journal of Law & the Humanities* 13 (2001), 3–32, 11.

68. See Andrew Schaap (ed.), *Law and Agonistic Politics* (Farnham: Ashgate, 2009).

69. e.g., Panu Minkinen: *Thinking Without Desire: A First Philosophy of Law* (Oxford and Portland, OR: Hart, 1999).

70. See Oren Ben-Dor, *Thinking About Law in Silence with Heidegger* (Oxford: Hart, 2007).

71. The distinction was taken up by Lacoue-Labarthe and Nancy in their *Centre de Recherches Philosophiques sur le Politique* in the 1980s.

72. Illan rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Abingdon: Routledge, 2011), p. 5.

(*arkhé*). As the editors of a recent volume on law and the political suggest, the relation between law and the political *displaces* the question “law is politics,” for it no longer seems adequate to treat law as a mere instrument of political power, or to reduce the critical outlook to the claim that law is politics by other means (in clear allusion to Kennedy).⁷³

I want to highlight two very different scholarly projects: First, a renewed interest in the work of Carl Schmitt⁷⁴: a rich scholarship that stresses the theological underpinnings of the modern state⁷⁵; sovereignty as power over the exception⁷⁶; the friend/enemy distinction as an ant-agonistic basis of the political⁷⁷; the political (rather than normative) foundation of the Constitution⁷⁸; or the constituent power, as pure potentiality separated from constituted juridical institutions.⁷⁹

An alternative, productive scholarship issues from Hannah Arendt,⁸⁰ who thinks of politics as the pluralistic realm of appearance and world disclosure, and retrieves an alternative history of law in terms of boundaries and relations.⁸¹ Whether successful or not, Arendt wishes to escape the logic of sovereignty and the fixation with (the

73. Mathew Stone, Illan rua Wall and Costas Douzinas, *New Critical Legal Thinking: Law and the Political* (Abingdon: Routledge, 2012), p. 1.

74. e.g., Matilda Arvidsson, Leila Brännström and Panu Minkinen (eds), *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology* (Abingdon: Routledge, 2016).

75. Paul Kahn, *Political Theology: Four Next Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

76. e.g., Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1995); *State of Exception*, trans. Kevin Attell (Chicago, IL and London: The University of Chicago Press, 2005).

77. Carl Schmitt, *The Concept of the Political*, trans. George Schwab (New Brunswick, NJ: Rutgers University Press, 1976); Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2005).

78. On the Schmitt/Kelsen debate, see Panu Minkinen, “Political Constitutionalism versus Political Constitutional Theory: Law, Power, and Politics,” *International Journal of Constitutional Law* I-CON 11: 3, 2013, 585–610; also Hans Lindahl, “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood,” in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 9–24.

79. Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans. Maurizio Boscagli (Minneapolis, MN and London: University of Minnesota Press, 1999); Martin Loughlin and Neil Walker (eds), op. cit.; Illan rua Wall, “Notes on an Open Constituent Power,” *Law, Culture and the Humanities* 11(3) (2015), 378–92; Illan rua Wall, “A Different Constituent Power: Agamben & Tunisia,” in Stone, rua Wall and Douzinas (eds), op. cit., pp. 46–66.

80. Marco Goldoni and Christopher McCorkindale, *Hannah Arendt and the Law* (Oxford and Portland, OR: Hart, 2013). Arendt herself, however, “avoids” the term political philosophy (Schaap, “Hannah Arendt and the Philosophical Repression of Politics,” in Jean-Philippe Deranty and Alison Ross (eds), *Jacques Rancière and the Contemporary Scene* (London and New York: Continuum, 2012), 145–65, 145).

81. See Keith Breen, “Law Beyond Command? An Evaluation of Arendt’s Understanding of Law,” in Goldoni and McCorkindale (eds), op. cit., pp. 15–34.

problematic of) the modern state.⁸² Furthermore, Arendt provides an understanding of judgement, “the more political of the human faculties,” which is phenomenologically richer than Schmittian decisionism and which is directed not so much at curbing bias or ideology as in earlier empirical models, as towards an “enlarged mentality” through role-taking and empathetic imagination.⁸³ Still, Arendt shares the desire to preserve a pure space of politics, free of “contamination” by private and social spheres.⁸⁴

The latter reveals a general dilemma of law as political philosophy: while the aim might be to rethink the possibility of politics, the result is to reinstate philosophy’s “rightful” place as the ordering principle. Philosophy reflects on the political as the precondition for politics (and hence of law), which suggests, to paraphrase Plato, that political philosophy appears “thrice removed” from the phenomena of law. More importantly, the desire to preserve a realm of pure politics often carries with it a correlative fear of “juridical contamination,”⁸⁵ which leads to a total incapacity to think of law “in a different key,” that is, to consider for law the same potentiality recognized for the political.

IV. Law as the Political Contingent

This modality arises out of a similar preoccupation with politics, but with an added skepticism towards the pretensions of political philosophy to set it right. Law as the political contingent valorizes creative expression, constitutive openness, and unpredictable events. Some recent monographs can comfortably be included in this category,⁸⁶ but here I want to highlight the work of Jacques Rancière, who explicitly argues against the claims of political philosophy to speak from a position of authority – and more generally rejects the language of *expertise*.⁸⁷ Since antiquity, political philosophy has sought to ground the organizing principles of the community and to remove the obstacles preventing a well-ordered society.⁸⁸ Faced with the attempt to ground politics on antecedent

82. Ibid.

83. Linda Zerilli, “‘We Feel our Freedom’: Imagination and Judgment in the Thought of Hannah Arendt,” *Political Theory* 33 (2005), 158–88; Jennifer Nedelsky, “Receptivity and Judgment,” *Ethics & Global Politics* 4(4) (2011), 231–54.

84. Andrew Schaap, “Hannah Arendt” in Deranty and Ross (eds), op. cit.; see also Christodoulidis and Schaap, “Arendt’s Constitutional Question,” in Goldoni and McCorkindale (eds), op. cit., pp. 101–16.

85. Giorgio Agamben, *State of Exception*, op. cit., p. 88.

86. e.g., Alexandre Lefebvre’s work on creative judgment, based on the “jurisprudence” of Gilles Deleuze and Henry Bergson [*The Image of Law: Deleuze, Bergson, Spinoza* (Stanford, CA: Stanford University Press, 2008)]; see also Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Abingdon: Routledge, 2013), or my own *The Experience of Tragic Judgment* (Abingdon: Routledge, 2013).

87. e.g., Jacques Rancière: *The Philosopher and his Poor*, trans. A. Parker, J. Drury and C. Oster (Durham, NC and London, Duke University Press, 2003); *The Ignorant Schoolmaster: Five Lessons in Intellectual Emancipation*, trans. Kristin Ross (Stanford, CA, Stanford University Press, 1991).

88. J. Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis, MN and London: University of Minnesota Press, 1999).

principles, Rancière underlines the contingency and precariousness of politics, which has “no reason for being,”⁸⁹ and in respect to which political philosophy “always comes too late.”⁹⁰ He also challenges the attempt to preserve a sphere of “pure” politics from the encroachment of everyday life (and from culture, economy, law, and so forth), for it is impossible to distinguish in advance what counts as such.

Rancière develops a particular understanding of politics, not as “the set of procedures whereby the aggregation and consent of collectivities is achieved, the organizations of powers, the distribution of places and roles, and the systems for legitimating this distribution” – which he renames *police*.⁹¹ Politics is, by contrast, *a process* whereby a given order or regime of visibility – an order that regulates what is “common-sensical” within a society – is interrupted by an egalitarian and dissensual logic that disrupts its naturalness.⁹² As an activity, then, politics is “a mode of expression that undoes the perceptible divisions” and “makes visible what had no business being seen, and makes heard a discourse where once there was only place for noise.”⁹³ Central to this understanding of politics are concepts such as *wrong*, *dissensus*, *subjectivation*, *equality*, and *demos*, which is the supplementary name of those who find no place (are “uncounted”) in the given “distribution of the sensible” [*partage du sensible*].

“The essence of politics is *dissensus*,” writes Rancière, which is “not a confrontation between interests or opinions,” but “the demonstration ... of a gap in the sensible [*le sensible*] itself.”⁹⁴ “What dissensus means is that every situation can be cracked open from the inside [and] reconfigured in a different regime of perception and signification.”⁹⁵ Arguing explicitly against the Habermasian model of communicative action, which presupposes equal partners already constituted, the specifics of political *dissensus* are that its partners are no more constituted than the object or the stage itself.⁹⁶ “Before any confrontation of interests and values ... there is the dispute over the object of dispute, the dispute over the existence of the dispute and the parties confronting each other in it.”⁹⁷ That is, “the place, the object, and the subjects of the discussion are themselves in dispute and must in the first instance be tested.”⁹⁸ This represents a most peculiar platform for argument, for “the

89. Jacques Rancière, *Dissensus: On Politics and Aesthetics*, trans. Steven Corcoran (New York: Continuum, 2010), p. 43.

90. Bruno Bosteels, “Archipolitics, Parapolitics, Metapolitics,” in Jean-Philippe Deranty (ed.), *Jacques Rancière: Key Concepts* (Abingdon: Routledge, 2014), pp. 80–92, 81. Rather than offer a general theory of politics or deduction from first principles, Rancière re-enacts “interventions” from a limited number of little scenes (Jacques Rancière, “A Few Remarks on the Method of Jacques Rancière,” *Parallax* 15(3) (2009), 114–23, 115).

91. Jacques Rancière, *Disagreement*, op. cit., pp. 28–9.

92. For a short description of how this can be done in practice, see Todd May, “Wrong, Disagreement, Subjectification,” in Jean-Philippe Deranty (ed.), loc. cit., pp. 69–79.

93. Rancière, *Disagreement*, op. cit., p. 30.

94. Rancière, “Ten Theses on Politics,” reprinted in *Dissensus*, loc. cit., p. 38.

95. Rancière, *The Emancipated Spectator* (London: Verso, 2009), pp. 25–49, 48.

96. Rancière, “Ten Theses,” p. 38.

97. Rancière, *Disagreement*, p. 55.

98. Ibid.

speaker has to behave *as though* such a stage existed, as though there were a common world of argument – which is eminently reasonable *and* eminently unreasonable, eminently wise and resolutely subversive, since such a world does not exist.”⁹⁹ As Rancière puts it, participants in dispute must put “two worlds in one and the same world.”¹⁰⁰

How to understand this “paradoxical mise-en-scène”¹⁰¹? Clearly not as a neutral forum, nor as a set of procedures shared by all participants. Nor, too, can the stage(ing) be said to be wholly unstructurable,¹⁰² or incommunicable as a *differend*.¹⁰³ Conspicuously, Rancière pictures this incommensurability as a form of *relation*,¹⁰⁴ as an encounter or meeting point of heterogeneous worlds that are brought together on this very occasion.¹⁰⁵ The creation of these litigious worlds is an aesthetic event, but not a mere invention of languages, for a political argument must always be won on pre-existing and constantly re-enacted distribution of languages.¹⁰⁶ Sharing much with the agonistic tradition, Rancière insists on the antagonistic dimension of political encounters.¹⁰⁷ Still a political disagreement is not simply a Schmittian confrontation between friends and enemies, or between ideological camps, but a struggle about what politics is; namely, over questions such as “where are we?”, “who are we?”, “what makes us a we?”, “what do we see and what can we say about it that makes us a we, having a world in common?”¹⁰⁸

How to think of law along the lines of this analysis, or, what would the law of the political contingent be? Such work remains to be done, and I can only offer a few general remarks here: to begin with, it would have to reject the assimilation of law with statist rule, command, or sovereign exception; nor would it fit to think of law as a means, a behavioral regularity to be causally explained, or as “contaminating” a realm of allegedly pure freedom. I would propose for law a doubling similar to that which Rancière articulates for police/politics: On the one hand we would have the order of *legalism*, that is, the set of procedures for the aggregation of consent, the organization of powers, the distribution of places and roles, and the system of legitimizing that distribution. On the other hand, a *juris-genetic* or norm-generative impulse that would come to interrupt the logic of legalism, by putting in question its overarching distribution of roles, places, subjects, and doctrines.¹⁰⁹

99. Ibid., p. 52.

100. Rancière, “Who is the Subject of Human Rights?,” *The South Atlantic Quarterly* 103 (2004), 297–310, 304.

101. Rancière, *Disagreement*, p. 55.

102. See Emiliios Christodoulidis, “Constitutional Irresolution: Law and the Framing of the Civil Society,” *European Law Journal* 9(4) (2003), 401–32, 431.

103. J.F. Lyotard, *The Differend: Phrases in Dispute*, trans. George Van Den Abbeele (Minneapolis, MN: University of Minnesota Press, 1988).

104. As Rancière writes in *Disagreement*, “the incommensurability on which politics is based is not identifiable with any ‘irrationality’. It is, rather, the very measure of the relationship between a logos and the *alogia* it defines” (op. cit., p. 43).

105. For further analysis, see Etxabe, “Tragic Incommensurability and Legal Judgment,” *Canadian Journal of Law and Jurisprudence* 24 (2011), 55–78.

106. Rancière, *Disagreement*, op. cit., p. 45.

107. For the distinctions between Rancière and Arendt, see Schaap, “Hannah Arendt,” op. cit., p. 163.

108. Rancière, “A Few Remarks on the Method of Jacques Rancière,” 116.

109. Robert Cover, “The Supreme Court, 1982 term—Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983), 4–68.

How norm-generative moments might emerge in specific legal settings again calls for further elaboration. Taking the cue from an important article on the paradoxical subject of human rights, a promising avenue may be found in the double existence of rights (and arguably of written law in general), which are first inscriptions in the regime of the visible, but then require to be activated in their potential by those who can make something out of that inscription.¹¹⁰ As theorized by Robert Cover, this norm-generating capacity is not the privilege of those who hold institutional office, or who are otherwise vested with the legal authority to do so. In the wake of radical pluralism, this power is acknowledged of anyone whomsoever, undergoing a process of subjectivation, who is able to instantiate a *wrong* in the fabric of legalism.

The staging of polemical scenes brings out the contradiction between the logic of legalism and the logic of jurisgenesis in order to reconfigure the legally sayable, thinkable, and doable. Law as the political contingent adopts an anti-positivist epistemology that engages the aesthetic world of sense-perceptions, and takes law to be more than an instrument to be utilized, as constitutive of self and society. However, the normative endeavor is not just world-creating, for it must take into account the pre-existing conditions, the available resources, and the structural limitations upon which it must act. For this is necessary to create both the normative language and the stage in which such a norm can be properly *heard* – often challenging the pre-conditions that would preclude a normative claim from being heard as *properly legal* (e.g., jurisdictional barriers). This is why this novel sense of law would also have to be accompanied by a rich phenomenology of judging in litigious or political contexts.¹¹¹

* * *

In this article, I have elaborated on four different modes to understand the relations of law and/as politics, which leads not only to different disciplinary projects, but to diverging understandings of both terms. Realists enlist politics to ground law in “real life,” rather than in conceptual abstractions; political scientists introduce empirical methods to compensate for the lack of those methods in law; political philosophers hope to retrace in the political what is eclipsed in the everyday fray; those favoring the political contingent wish to make visible a potentiality that may be hard to perceive within the strictures of legalism. But in connecting politics with law each in its own way, the meaning of law also shifts: thus realists understand law not as a systematic construction or conceptual abstraction, but as means to an end; political scientists take law as a phenomenon to be observed, tested, and explained. Political philosophers aim either to reconstruct or to question law, according to a philosophically prior reflection; those who undertake the political contingent seek to *recharge* law, just as political philosophers wish to retrace the political. These four projects share a critical outlook of law as an autonomous and self-sustaining discipline. Together, they lay bare the need to rethink the relational aspect of law and politics, once the aphorism “law is politics” has lost its critical luster. In my own rendering, law and politics are inextricably related, but considering that both law and

110. Rancière, “Who is the Subject?”, loc. cit., 302. It goes without saying that this is an anti-foundationalist conception of rights not grounded on any anthropological core essence, where the content and meanings of rights change as they are mobilized in specific contexts.

111. For further elaboration, see Etxabe, *The Experience of Tragic Judgment*.

politics can have a divided phenomenological existence, not all manifestations of law and politics are related in the same way, and just as politics cannot be equated with ideology, nor can law be equated with legalism.

In expressing my inclination for law as the political contingent, I do not simply embrace a form of naïve optimism, which is how this debate is often framed by the hermeneutics of suspicion.¹¹² The relevant issue is not whether one harbors hope, or whether one has contrarily lost it, but how to put one's critical task to its most valuable use. To focus on, and to valorize, scenes of dissensus, events of world-disclosure, and spaces for aesthetic irruptions¹¹³ brings forth an immanent potentiality in law, not because the world is "full of possibilities" as the commercial might put it, but because this life-affirming move refuses to grant an aura of invincible ubiquity (omnipotent and omnipresent) to any description one has reason to reject as a world-picture. Law as a political contingent is suspicious of total theories, theories without gaps, including neoliberalism's attempt to present itself as a world system.¹¹⁴ To pay heed to such totalizing claims, even from a critical perspective, is to acknowledge them as a power over us that may distract us from other relevant tasks.

Against the defeatism that "urges us to admit that all our desires for subversion still obey the law of the market,"¹¹⁵ but which "reserve[s] for itself the position of the lucid mind casting a disenchanted eye over a world in which critical interpretation of the system has become an element of the system itself,"¹¹⁶ the form of critique advanced here starts from different presuppositions. Between the unmeetable demand of ethics and the instrumental rationality of interests of which Kennedy speaks, between the (empirical) is and the (metaphysical) ought, exists a critical space that has to be reclaimed. "Might be" is a position that well suits such a critical practice,¹¹⁷ and which starts with a tiny modification in the posture of a body.¹¹⁸ A political critique of law is not limited to denouncing law's ideological make-up, abuse, or domination, but to inquire into the kind of political community that law enables (or denies), and what life-in-common it avails (or excludes). For this neither realism's positivist epistemology, nor political science's reliance on method, nor political philosophy, with its own antecedent language, will suffice. In order to sketch a "new topography of the possible,"¹¹⁹ a full dramaturgy of law is needed.

112. See Duncan Kennedy, "The Hermeneutic of Suspicion in Contemporary American Legal Thought," *Law & Critique* 25 (2014), 91–139.

113. Mónica López Lerma, "Aesthetic Irruptions: Politics of Perception in Alex de la Iglesia's 'La Comunidad,'" in Paul Bowman (ed.), *Rancière and Film* (Edinburgh: Edinburgh University Press, 2013), pp. 99–112.

114. Marshall Sahlins, "Cosmologies of Capitalism: The Trans-Pacific Sector of 'The World System'," *Proceedings of the British Academy* 74 (1988), 1–51.

115. Jacques Rancière, *The Emancipated Spectator* (London: Verso, 2009), pp. 25–49, 48.

116. *Ibid.*, p. 37.

117. Rancière, "A Few Remarks on the Method of Jacques Rancière," 119.

118. *Ibid.*, 117.

119. Rancière, *The Emancipated Spectator*, p. 49.